

NOTICE

Decision filed 10/24/13, corrected 11/25/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 130059-U

NO. 5-13-0059

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MICHAEL SPARKS,

Defendant-Appellant.

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Appeal from the
Circuit Court of
Madison County.

No. 00-CF-2229

Honorable
Kyle Napp,
Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Spomer concurred in the judgment.
Justice Wexstten specially concurred.

ORDER

¶ 1 *Held:* The trial court properly dismissed that portion of the defendant's postconviction petition relating to a trial witness's testimony that the defendant had confessed to killing his wife, and the court's denial of the defendant's remaining postconviction claim concerning the use of a stun belt at the defendant's trial was not manifestly erroneous.

¶ 2 The defendant, Michael L. Sparks, appeals the dismissal of certain claims in his postconviction petition during the second stage of postconviction proceedings and the denial of his remaining postconviction claims following a third-stage evidentiary hearing. For the following reasons, we affirm.

¶ 3 Initially, we note that the defendant raised several issues in his postconviction petition that he did not argue on appeal. Therefore, we will set forth only those facts pertinent to our disposition of the specific issues on appeal. Following a jury trial, the defendant was convicted of first-degree murder for shooting his wife. He was sentenced to 35 years'

imprisonment. His conviction and sentence were affirmed on direct appeal. *People v. Sparks*, No. 5-03-0297 (Apr. 11, 2006) (unpublished order pursuant to Supreme Court Rule 23). On May 24, 2007, the defendant filed a petition for postconviction relief pursuant to section 122-1 of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 (West 2006)), claiming, *inter alia*, that his constitutional rights were violated when he was forced to wear a stun belt during his trial without a showing of manifest need; that he was denied effective assistance of counsel when his trial counsel failed to object to the use of the stun belt; that he was denied effective assistance of counsel when his counsel failed to investigate and produce witnesses to contradict testimony from Manuel "Butch" Tomerlin, an inmate who was housed within the same cellblock as the defendant, that the defendant had confessed to intentionally killing his wife; and that this confession was obtained in violation of his constitutional rights.

¶ 4 Thereafter, the State filed a motion to dismiss the defendant's postconviction petition, and on May 22, 2009, the trial court granted the State's motion, finding that the defendant had waived his claims concerning the stun belt and Tomerlin's testimony because he could have raised these issues in a posttrial motion or on direct appeal and he failed to do so. Additionally, with regard to the stun-belt issue, the court noted that it had observed the defendant "moving about the court room without difficulty during breaks in the trial, and consulting often with counsel during the trial proceedings."

¶ 5 On appeal, this court reversed the dismissal, finding that "the defendant should be allowed the opportunity to expand upon the existing claims and add additional claims." *People v. Sparks*, No. 5-09-0314, order at 3 (Apr. 15, 2010) (unpublished summary order pursuant to Supreme Court Rule 23). Therefore, this court remanded to allow the defendant an opportunity to amend his postconviction petition and directed the circuit court to "conduct a new second-stage hearing" on the amended petition. *Sparks*, No. 5-09-0314, order at 3.

¶ 6 On remand, the defendant filed an amended petition for postconviction relief, arguing, *inter alia*, that he was denied his constitutional right to a fair trial because he was required to wear a stun belt without a showing of manifest need for the duration of the trial proceedings; that he was denied effective assistance of counsel when his trial counsel and appellate counsel failed to raise the stun-belt issue; that the State presented testimony at the trial that it knew or reasonably should have known was false, *i.e.*, Tomerlin's testimony concerning the defendant's confession; that this confession was obtained in violation of his constitutional rights; that trial counsel was ineffective for his failure to investigate and produce witnesses to impeach Tomerlin's testimony; and that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on appeal.

¶ 7 With regard to the stun-belt issue, the defendant argued that the use of the stun belt at his trial unfairly impaired his ability to participate in jury selection, undermined his presumption of innocence, interfered with his right to effectively participate in his defense, and interfered with his ability to concentrate on the trial proceedings. The defendant indicated that he was told immediately before his trial that he would be required to wear a stun belt in order to be present at the trial, that the device would discharge approximately 50,000 volts of electricity for a period of approximately five seconds when activated, and the device would be activated if "he did not comply with the instructions of the officer, made any outburst or quick movement, made any perceived hostile movement, tampered in any way with the belt, or failed to comply with the commands of the officer." "

¶ 8 The defendant argued that the stun belt created a "noticeable bulge" on his back and that the "bulge" prevented him from sitting normally and comfortably during the trial. According to the defendant, the device was a constant distraction and source of stress throughout the trial, and it prevented him from being able to effectively communicate with his trial counsel. He claimed that the stun belt was the primary reason for his decision not

to testify. Therefore, he argued that his constitutional rights to a fair and impartial trial by jury, to present a full and complete defense, and to a fundamentally fair trial were violated. Attached to the first amended postconviction petition was an affidavit by the defendant wherein he stated that he had been "forced" to wear the stun belt throughout the trial proceedings and that he was told that he would not be allowed to attend the trial if he failed to comply. He stated that he informed his trial counsel about the stun belt and requested counsel "do something so that [he] would not have to wear the stun belt during trial," and his counsel responded that it was the sheriff's policy, there was "nothing he could do," and the defendant should just "sit quietly." The defendant further argued that his trial counsel was ineffective for failing to object to the use of the stun belt and for his failure to request the trial court conduct a hearing to determine that the use of the stun belt was justified by an essential state interest specific to the defendant's case. The defendant further argued that his appellate counsel was ineffective for failing to raise the stun-belt issue on direct appeal.

¶ 9 With regard to the defendant's claims involving Tomerlin's testimony, the defendant argued that the State knew or reasonably should have known that Tomerlin presented false testimony at trial. Attached to the defendant's postconviction petition was a July 6, 2007, affidavit of Jeremy Brown, a former inmate at the Madison County jail, which indicated that Tomerlin had told Brown that the defendant had not spoken to Tomerlin about the case and that Tomerlin had also told the prosecutor that any information that he had on the defendant was obtained from newspaper articles. Also, the defendant argued that the State violated his constitutional right to counsel when it engaged Tomerlin to obtain incriminating statements from him when he was represented by counsel and that trial and appellate counsel were ineffective for failing to raise this issue. The defendant further argued that trial counsel was ineffective for failing to investigate and produce witnesses to contradict Tomerlin's testimony and appellate counsel was also ineffective for failing to raise this issue on direct appeal.

¶ 10 On September 16, 2010, the State filed a motion to dismiss the defendant's amended petition for postconviction relief, arguing that neither the defendant nor his counsel voiced any concerns regarding the wearing of the stun belt at trial and its effect on the defendant's ability to assist in his defense. The State noted that the circuit court previously stated that it had observed the defendant throughout the course of the trial and did not see him having any difficulty with moving around the courtroom or conferring with his counsel. The State further argued that the defendant's claims involving Tomerlin's testimony were waived because he could have raised these issues in a posttrial motion or on direct appeal and he failed to do so.

¶ 11 Thereafter, the circuit court denied the State's motion to dismiss with regard to the stun-belt issue and granted the defendant a third-stage evidentiary hearing on that issue. The court requested that the State be prepared to have a "retrospective Boose hearing," which would take place during the evidentiary hearing. The court granted the State's motion to dismiss with regard to the claims concerning Tomerlin's testimony, finding that these claims could and should have been raised on direct appeal. Alternatively, assuming that the issue had not been waived, the court analyzed whether the defendant's trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). With regard to the claim that counsel was ineffective for his failure to investigate and produce witnesses to contradict Tomerlin's testimony, the court concluded that the record reflected that defense counsel was aware of the possible witnesses and their anticipated testimony and that counsel's decision not to put them on the stand was a matter of trial strategy. As to the defendant's claims that the State knew or should have known that Tomerlin's testimony was false and that the defendant's constitutional rights were violated as Tomerlin was acting as an agent of the State, the circuit court found that these issues either had been raised on appeal or could have been raised on appeal and the failure to do so prohibited the defendant from raising them on postconviction.

The circuit court noted that, in this court's April 11, 2006, order on direct appeal, the issue of prosecutorial misconduct as it related to Tomerlin was addressed and this court determined that no prosecutorial misconduct had occurred. This court had noted that the State maintained discretion and the ability to make the type of deal that it made with Tomerlin.

¶ 12 Although the court noted that Jeremy Brown's affidavit was dated July 6, 2007, after the defendant's direct appeal, the court noted that the affidavit did not state that Tomerlin had admitted to lying on the stand. The court stated as follows with regard to this affidavit:

"[A]ccording to Brown, Tomerlin had not even testified at the time of the alleged conversation between Brown and Tomerlin. Even taking Brown's affidavit as true, which this court must at this stage in the proceedings, it does not amount to perjury by Tomerlin and; therefore, cannot establish that the prosecutor presented perjured testimony. Moreover, even if this court were to assume that false testimony was used during trial, the petitioner is required to show that there is a reasonable likelihood that it could have affected the finding of guilt. This court is unable to conclude that Tomerlin's testimony, if false, likely affected the outcome. Tomerlin's credibility was thoroughly challenged during cross-examination and even without Tomerlin's testimony the evidence against petitioner was substantial. The petitioner's characterization that Tomerlin's testimony was the 'linchpin' of the state's case is not supported by the evidence."

¶ 13 On July 13, 2011, a third-stage evidentiary hearing was held on the remaining issues in the defendant's postconviction petition, which included the stun-belt issue. Sam Mallory, the defendant's friend, testified that he and his wife visited the defendant on the day of the trial and observed that the defendant appeared "stiff" and "didn't move real quickly." Mallory noticed that a "handler" for the defendant was present during the visit. Mallory observed that when he offered the defendant a Lifesaver mint, the defendant looked at his "handler" and

said, "Is it okay, boss?" Charlotte Mallory, Sam's wife, explained that the defendant was acting "strange" during the visit, describing him as "motionless" and very "spacey."

¶ 14 Orville Strohbeck testified that he had worked with the defendant for approximately 30 years. Strohbeck attended the defendant's trial and noticed that an individual from the sheriff's office sat next to the defendant throughout the entire trial proceedings. Strohbeck sat behind the defendant during the trial. Strohbeck noticed that when the defendant entered the courtroom, he had a "big bulge on his back" and that the bulge was "very noticeable." He later asked someone what it was and was told that it was a stun belt. Strohbeck noticed that the defendant's demeanor at trial was different from his demeanor when Strohbeck visited him in jail. According to Strohbeck, the defendant did not smile, he did not attempt to talk to Strohbeck, he sat "a little bit slumped in his chair" and had his head hanging down, he maintained that same posture for the majority of the trial, he remained virtually motionless, and he did not look around the courtroom. Strohbeck did not remember the defendant ever leaning over to talk with his counsel while the trial was in progress.

¶ 15 Dan Collman, a lieutenant with the Madison County sheriff's office, testified that he was trained in the operation of the stun belt because the sheriff wanted to take alternative security measures in the courtroom. Following the training, a written policy was implemented by the sheriff's office which allowed the use of a stun device during criminal court proceedings in the following instances: where the defendant was charged with murder, Class X charges, or charges involving serious personal injury; or where a defendant had been aggressive in jail or where the sheriff's office had previously found the defendant troublesome. The defendant was required to wear the stun belt because of the nature of his charge. Collman believed that the State's Attorney's office had reviewed and approved the written policy before it was implemented. He testified that the electronic device could generate 50,000 to 70,000 volts of electricity for a period of five to eight seconds. He

explained that as part of his training, he had to take a hit from the stun belt. He described the effect of the shock as similar to that of a taser, causing the recipient of the shock to have what he described as a huge body cramp.

¶ 16 Collman testified that it was standard procedure for an officer to read written admonishments to the inmate regarding the stun belt, and he had read these admonishments to the defendant prior to bringing him out for trial. The admonishments were as follows:

"You are hereby advised that you are being required to wear a remote activated electronic security belt system as a security precaution. This belt will discharge approximately 50,000 volts of electricity for a period of approximately 5 seconds when activated. An officer has the ability to remotely activate the stun belt which will be worn around your waist. If you do not comply with the instructions of the officer(s), the belt may be activated. The device may be activated under the following conditions: Any outburst or quick movement, any perceived hostile movement, any attempt to tamper with the belt, failure to comply with verbal commands by the officer, any attempt to escape and any overt act against any person."

When asked what would happen if a defendant had refused to comply with the stun-belt requirement, Collman responded that the officer would then contact the trial judge for direction on how to proceed. Collman acknowledged that he never had anyone refuse to wear the belt. He opined that the circuit judges knew that the sheriff's office was using stun belts for security purposes. He did not believe that the prisoners were told that a trial would be held in their absence if they refused to wear the stun belt, and he had never told them that.

¶ 17 The defendant told Collman that he had raised horses and had been around livestock, and that he had previously touched an electric fence. Collman responded that the shock from the stun belt was "not any worse than that." Collman opined that he would rather be shocked by the stun belt than be shocked by an electric fence.

¶ 18 Collman explained that prior to trial, he observed the defendant for approximately two years, having brought him over to court on a number of occasions for pretrial motions. The stun belt was not used on those occasions, and the defendant was instead placed in handcuffs and shackles. He acknowledged that the defendant was a "reasonable person" and an "easy person to work with," and that the defendant had not caused the sheriff's office any problems. Collman testified that he did not notice any appreciable change in the defendant's demeanor during the trial, the defendant did not appear concerned about wearing the stun belt, and the defendant did not voice any concerns about wearing the stun device. During breaks in the trial, Collman had conversations with the defendant about trivial matters, such as horses and cars. Collman had never deployed the stun belt on a criminal defendant during a trial. He testified that the stun belt would only be activated when there was imminent danger such as a defendant attempting to attack his attorney, the judge, or a witness or a defendant attempting to escape. As required, the sheriff's office checked with the nursing staff at the jail to see if the defendant had any known health problems before fitting him with the stun belt.

¶ 19 Collman explained that the stun belt consisted of two packs approximately the size of playing cards. The stun belt was fastened at the hip with one of the packs on the side and the other located toward the back. Collman recalled that the defendant wore a suit jacket, a shirt, and a T-shirt over the stun belt. He explained that he was in the courtroom during the trial proceedings, and he wore a suit to keep anyone from directly connecting him to the defendant. The belt was activated by a remote activation switch, which was in Collman's possession during trial.

¶ 20 The defendant testified that he suffered from posttraumatic stress disorder, which resulted from his military service in the Vietnam War. He testified that he was not aware that he would be required to wear a stun belt until immediately before the trial started. His

attorney was not present when Collman told him about the stun belt. He explained that he had been to court numerous times with his attorney, and he never had to wear a stun belt at those previous court appearances. After learning that he would be required to wear the stun belt, he was upset and felt like he was being threatened with bodily harm. He believed that he had to wear the stun belt in order to go to court and that it was similar to wearing shackles and handcuffs or being put in his cell. He explained that he did not object to wearing the electronic device because "[y]ou learn while you are in prison and the Army and everyday life when someone with authority tells you to do something you do it or suffer the consequences." It was conveyed to him before court that it would be better if he complied and did not make a "fuss." He was "sure" that he had complained to his attorney, and he believed that his attorney had told him that it was the sheriff's policy and that he should sit there and be quiet. He believed that he had told Strohbeck and his brother that he was wearing a stun belt during the trial proceedings. The defendant expressed concern that he had stayed "too quiet" during the trial proceedings because of the presence of the stun belt. He explained that there were times that he had wanted to ask his attorney to cross-examine certain witnesses and to have his attorney ask witnesses certain questions, but he had stayed quiet because of the stun belt. However, he acknowledged that during the trial, there was one instance where he had suggested his counsel cross-examine a witness. His attorney responded as follows: "Mike don't be touching me under the table. I will take care of this." He also acknowledged that there may have been more occasions where he had consulted with his counsel during trial. The defendant explained that he had wanted to get on the stand and contradict Tomerlin's testimony that he had confessed to shooting his wife. He testified that he "most likely" would have testified if he was not wearing the stun belt. He explained that he had feared "retaliation or the reaction from it or the bodily harm" that the stun belt would cause. He was afraid that the device would be activated during his testimony because he

would be saying things that other people would not want said. He was also concerned because he "didn't want to get up there and flip out and make a fool" of himself because the stun belt "took control of [him] and flipped [his] mind." He recalled that his "mind was occupied" by the stun belt, which prevented him from being fully aware of what was going on in the courtroom. Additionally, he explained that the stun belt was physically uncomfortable and it prevented him from being able to lean back in his chair.

¶ 21 The testimony of Herman Edward Lamb, Jr., a former inmate at the Madison County jail, was presented by stipulation. It was stipulated that Lamb would have testified that on the day of his jury trial, he was told by a sheriff department official that he would be required to wear a stun belt during the trial. He was also told that if he refused, the trial would proceed and he would not be allowed to attend. The testimony of Charles Romani, the trial judge who presided over the defendant's trial, was also presented by stipulation. It was stipulated that he would have testified that he was not aware at any time before or during the trial that the defendant was wearing any sort of stun belt or other restraint. Further, the testimony of J. William Lucco, the defendant's trial counsel, was also presented by stipulation. It was stipulated that he would have testified that he had no recollection as to whether the defendant was wearing a stun belt or any other restraining device during the trial and that he had no recollection as to whether the defendant had complained to him about the stun belt interfering with his ability to participate in the trial. However, based on past practice, he would have objected to the use of the stun belt had the defendant advised him that it interfered with his ability to participate in the trial or impacted his decision to testify.

¶ 22 Following the hearing, the circuit court denied the defendant's postconviction petition. The court noted that the evidence indicated that neither the defendant's attorney nor the trial judge knew, at any time before or during the trial, that the defendant was wearing any sort of restrictive device during the course of the trial. Because neither counsel nor the court was

aware of the stun belt, it was undisputed that no hearing was conducted in accordance with *People v. Boose*, 66 Ill. 2d 261 (1977). The court noted that the defendant had failed to raise this issue in his posttrial motion and on direct appeal. Although the court noted that ordinarily a defendant's failure to object at trial and to raise an issue in a posttrial motion or on direct appeal results in forfeiture of the issue, the court analyzed whether the issue could be considered under plain-error review. Relying on *In re Jonathon C.B.*, 2011 IL 107750, the court concluded that the trial court had not erred by failing to conduct a *Boose* hearing because it was undisputed that the trial court was not aware that the defendant was wearing a stun belt during the trial proceedings. The court then concluded that it need not address the additional arguments of the defendant with regard to plain error surrounding the use of the stun belt. Because the court determined that the stun-belt issue was not plain error and was not raised in a posttrial motion or on direct appeal, it concluded that the matter was barred by the doctrine of waiver. The court also adopted by reference the May 22, 2009, ruling of the circuit court with regard to this issue. The defendant appeals.

¶ 23 The Act provides a mechanism for a criminal defendant to assert that his conviction or sentence was based on a substantial violation of his constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). "A post-conviction proceeding is not an appeal *per se*, but a collateral attack upon a final judgment [citation], and the scope of post-conviction review is limited to issues which have not been, and could not have been, previously adjudicated [citation]." *People v. Owens*, 129 Ill. 2d 303, 307-08 (1989). The judgment of the reviewing court on direct appeal is *res judicata* as to all issues decided, and any claim that could have been presented is, if not presented, thereafter barred by waiver. *People v. Gully*, 243 Ill. App. 3d 853, 862 (1993).

¶ 24 Here, the defendant did not raise the stun-belt issue in his motion for new trial or on direct appeal. The defendant argues that defense counsel was unable to raise the issue

because he was "kept in the dark about it" and that the defendant should not be expected to know that his constitutional rights were violated when he was told by the Madison County sheriff that he was required to wear a stun belt during the trial. Following the third-stage evidentiary hearing, the circuit court concluded that the defendant's failure to object to the use of the stun belt resulted in waiver of the issue, but then recognized that plain-error review was an exception to the waiver rule. Analyzing whether the plain-error doctrine was applicable, the court concluded that no error had occurred.

¶ 25 Initially, the State argues that plain-error review does not apply to postconviction proceedings. "The plain-error rule permits a court on direct appeal to take notice of plain errors and defects affecting substantial rights which were not brought to the attention of the trial court." *Gully*, 243 Ill. App. 3d at 862. However, the plain-error rule does not apply where a defendant collaterally attacks his conviction or sentence under the Act. *Owens*, 129 Ill. 2d at 316. Although the circuit court was incorrect to analyze this issue under plain-error review, it was not wrong to conclude that the stun-belt issue was barred by waiver. The right to raise constitutional errors may be defaulted if the errors are insufficient to show that the defendant was deprived of a fair trial. *People v. DuPree*, 353 Ill. App. 3d 1037, 1043 (2004).

¶ 26 In his brief, the defendant acknowledges that his counsel was not aware that he was wearing a stun belt. The parties had stipulated that the defendant's trial counsel would have testified that he had no recollection as to whether the defendant was wearing a stun belt and no recollection as to whether the defendant had complained to him about the stun belt interfering with his ability to participate in the trial. However, based on past practice, counsel would have raised the issue with the court had the defendant advised him that it was interfering with the defendant's ability to participate in the trial or was impacting his decision to testify. Additionally, the parties stipulated that the trial judge would have testified that he did not know that the defendant was wearing a stun belt during the trial proceedings.

¶ 27 The record indicates that the defendant had multiple opportunities to discuss the stun-belt issue with his trial counsel and with the trial court. During the trial, the judge addressed the defendant, outside the presence of the jury, about his decision not to testify. The court admonished him as to his rights and made sure that he had discussed his decision with counsel. The defendant did not indicate that this decision was in any way attributable to wearing the stun belt. However, the defendant argues that he did not consult with his counsel about the stun belt because he was told that it was the sheriff department's policy and that it would be better for him to remain quiet and not complain. Assuming that the defendant did not confer with counsel during the trial proceedings because he was told to remain quiet, we note that he had several opportunities to tell his counsel about the stun belt after the trial had concluded, when he was no longer wearing the restraining device. The defendant's trial counsel filed a motion for new trial in November 2002, which did not address this issue. The defendant was present at the hearing on the motion for new trial, which was held in January 2003, and again the stun-belt issue was never mentioned as a basis for a new trial. During the defendant's sentencing hearing in February 2003, defense counsel indicated that he had met with the defendant and had talked with him a number of times in preparation for the hearing. Further, the record indicates that the defendant had directly addressed the circuit court during the sentencing hearing about new evidence that he had discovered in his case, but he never mentioned the stun-belt issue. The record indicates that the defendant was not hesitant about informing his counsel and the circuit court regarding matters concerning him. However, the defendant never informed his counsel or the circuit court that the use of the stun belt at the trial proceedings had hampered his ability to assist his trial counsel, that it was visible to the jury, or that it played any role in his decision not to testify. Therefore, we conclude that the defendant had ample opportunity to bring this matter to his trial counsel either during trial or after the trial and his failure to do so results in waiver of this issue on

postconviction proceeding. Accordingly, the circuit court did not err in denying the defendant postconviction relief on the stun-belt issue based on waiver.

¶ 28 However, assuming that the defendant did not waive this issue, we conclude that the defendant has failed to show that he suffered a substantial deprivation of his constitutional rights. To be entitled to postconviction relief, a defendant must show that he has suffered a substantial deprivation of his constitutional rights in the proceedings that produced the conviction or sentence being challenged. *Pendleton*, 223 Ill. 2d at 471. The present case involves the denial of the defendant's postconviction petition with regard to the stun-belt issue following a third-stage evidentiary hearing. Throughout the second and third stages of the postconviction proceeding, the burden is on the defendant to make a substantial showing of a constitutional violation. *Id.* at 473. "When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a circuit court's decision unless it is manifestly erroneous." *Id.*

¶ 29 In *Boose*, 66 Ill. 2d at 265, our supreme court noted that shackling of a defendant should be avoided, if possible, because (1) it tends to prejudice the jury against the accused, (2) it restricts his ability to assist his counsel during trial, and (3) it offends the dignity of the judicial process. The court explained that a defendant may be shackled when there is reason to believe that he may attempt to escape, that he may pose a threat to the safety of the people in the courtroom, or that it is necessary to maintain order during trial. *Id.* at 266. In determining whether to shackle a defendant, the trial judge must "state for the record his reasons for allowing the defendant to remain shackled, and he should give the defendant's attorney an opportunity to present reasons why the defendant should not be shackled." *Id.* Over time, the supreme court has expanded the *Boose* decision to another type of restraint, *i.e.*, electronic stun belts. See *People v. Allen*, 222 Ill. 2d 340, 347 (2006) (the use of electronic stun belts in the courtrooms is warranted only when there has been a showing of

manifest need for the restraint).

¶ 30 In *Allen*, 222 Ill. 2d at 344, our supreme court analyzed whether it was plain error for the defendant to be forced to wear, without a showing of manifest need, an electronic security belt during his trial. The court concluded that although error had occurred because a *Boose* hearing was not held, the defendant could not show that his presumption of innocence, ability to assist his counsel, or the dignity of the proceedings was compromised. *Id.* at 353-54. The court noted that the defendant wore "the electronic device into the third day of his jury trial with no objection, complaint, or any apparent difficulty consulting with his counsel." *Id.* at 353. The court further noted that nothing in the record indicated that the defendant was made nervous or anxious by the fact that he was wearing the device. *Id.* at 357. The court concluded that "none of the actions of defendant, his counsel or the court support the conclusion that defendant's presumption of innocence or the dignity of the court was effected [*sic*] by the error in failing to hold the requisite *Boose* hearing." *Id.* at 357-58. Therefore, the court concluded that the defendant could not establish that the presence of the stun belt prevented him from obtaining a fair trial. *Id.* at 353-54.

¶ 31 Here, the defendant argues that the stun belt had the following effect on his behavior at trial: it prevented him from consulting with counsel, exhibiting "any open concern over testimony by witnesses that lied about him," reacting in a "human emotional way," and paying attention to the trial court proceedings; it affected his decision to testify; and it caused him to have a submissive demeanor. However, we note that evidence was presented at the third-stage evidentiary hearing that the use of the stun belt did not affect the jury, the defendant's presumption of innocence, his ability to assist his counsel in his defense, or his decision not to testify. Although Strohbeck testified that he had noticed a "bulge" on the defendant's back, there was no evidence presented that the jury could have seen the stun belt. Collman testified that the stun belt consisted of two packs approximately the size of playing

cards. The defendant was wearing a T-shirt, shirt, and jacket over the device. The officers in the courtroom dressed in suits so as to not call attention to any connection between them and the defendant. Further, neither the defendant's counsel nor the trial court knew that the defendant was wearing a stun belt.

¶ 32 Strohbeck testified that he did not observe the defendant consulting with counsel during the trial. However, the defendant acknowledged that he had conferred with his counsel. The defendant admitted that when he requested counsel to ask a witness certain questions, counsel told the defendant to stop touching him under the table and let him handle it. The defendant agreed that there were probably more times that he had conferred with his counsel during the trial, but he did not remember. In its May 2009 order, the trial judge noted that "throughout the trial, the trial court observed defendant moving about the court room without difficulty during breaks in the trial, and consulting often with counsel during the trial proceedings." Collman testified that he had observed the defendant on many occasions during courtroom proceedings, and that he did not believe that the defendant was concerned about wearing the stun belt. Collman noticed no appreciable change in the defendant's demeanor when the defendant was wearing the stun belt. Collman and the defendant discussed trivial matters during the breaks in trial. Accordingly, we conclude that the defendant failed to show that he suffered a substantial deprivation of his constitutional rights.

¶ 33 Moreover, according to the stipulation of the defendant's trial counsel, it would appear that had the defendant told counsel that he was forced to wear a stun belt during the trial, counsel would have brought the issue to the attention of the trial court. We must presume that had the circuit court been aware that the defendant was wearing a stun belt, the court would have made the proper inquiry. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 72 ("This court presumes that a trial judge knows and follows the law unless the record affirmatively

indicates otherwise."). "[I]t is axiomatic that in order to determine whether a defendant should *remain* physically restrained, a circuit court must first *know* that a defendant has been physically restrained. The error is in allowing a defendant to remain shackled without conducting a *Boose* hearing." (Emphasis in original.) *In re Jonathan C.B.*, 2011 IL 107750, ¶ 74. Therefore, the circuit court did not err by its failure to conduct a *Boose* hearing because it was unaware that the defendant had been physically restrained.

¶ 34 The defendant next argues that the trial court erred by granting, at the second stage of the postconviction proceedings, the State's motion to dismiss as to the issues raised regarding Tomerlin's testimony. Specifically, the defendant argues that the State knew or should have known that Tomerlin's testimony concerning the defendant's jailhouse confession was perjury as evidenced by Brown's affidavit. He argues that when a criminal defendant supports a postconviction petition with evidence that a key witness, out of court and not under oath, said that he lied at trial, the trial court must hold an evidentiary hearing to determine whether the witness committed perjury at trial.

¶ 35 "With the second-stage of the postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Postconviction Act." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 15. At this stage, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. "Thus, the dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *Snow*, 2012 IL App (4th) 110415, ¶ 15. The dismissal of the postconviction petition is proper where the allegations are contradicted by the record from the original trial proceedings. *People v. Coleman*, 183 Ill.

2d 366, 382 (1998). The circuit court's dismissal of a postconviction petition at the second stage of the postconviction proceedings is subject to *de novo* review. *Pendleton*, 223 Ill. 2d at 473. The reviewing court may affirm a trial court's dismissal at the second stage on any grounds substantiated by the record, regardless of the trial court's reasoning. *Snow*, 2012 IL App (4th) 110415, ¶ 17.

¶ 36 Here, taking the allegations contained in the affidavit as true, we conclude that Brown's affidavit is insufficient to merit an evidentiary hearing on the defendant's claim. Initially, we note that Brown's affidavit set forth the following facts: it was rumored that Tomerlin would testify falsely against other inmates at the Madison County jail in order to get a better deal from the prosecutor's office; it was also rumored that the defendant was Tomerlin's next "victim"; Brown confronted Tomerlin about these accusations; Tomerlin claimed that the State's Attorney had approached his attorney because the State was looking for information concerning the defendant; Tomerlin was offered a potential deal for any information that he could obtain; Tomerlin told Brown that the defendant had never discussed his case with Tomerlin and that any information that Tomerlin had on the defendant was obtained from newspaper articles; and Tomerlin declined the State's offer and told the prosecution that he had obtained his information on the defendant from other sources. The record reveals that the conversation between Tomerlin and Brown occurred before Tomerlin testified in the defendant's case. The fact that the other inmates in the jail believed that Tomerlin was the type of character to perjure himself for a lesser sentence or that they believed that the defendant was going to be a victim of Tomerlin's does not support an inference that Tomerlin perjured himself with the prosecutor's knowledge. On direct appeal, this court found no prosecutorial misconduct with regard to the State's Attorney offering Tomerlin a deal in exchange for his testimony. According to the affidavit, Brown and some of the other inmates confronted Tomerlin about these rumors. It was not likely that

Brown would be truthful under these circumstances. Further, we note that Tomerlin testified at trial that he had multiple conversations with his attorney about the defendant's jailhouse confession before his counsel spoke with the prosecutor and that he had obtained his information straight from the defendant. Accordingly, we conclude that the trial court did not err when it granted the State's motion to dismiss with regard to this issue.

¶ 37 Last, without citing any authority, the defendant argues that the trial court erred by dismissing his postconviction claim that his counsel was ineffective for failing to investigate and produce witnesses to impeach Tomerlin's testimony and that appellate counsel was ineffective for failing to raise the ineffective-assistance-of-trial-counsel claim on appeal. The defendant argues trial counsel "failed to ferret out significant evidence pre-trial that would have seriously impeached Tomerlin's perjury."

¶ 38 To establish that the defendant's trial counsel provided ineffective assistance, the defendant must show that his counsel's performance was so deficient that his representation fell below an objective standard of reasonableness, and counsel's deficient performance created a reasonable probability that the outcome of the proceeding would have been different absent counsel's deficient performance. *People v. Johnson*, 183 Ill. 2d 176, 188 (1998). To prevail on an ineffective-assistance-of-counsel claim, the defendant must satisfy both prongs of this test. *Id.* The defendant must overcome the strong presumption that defense counsel's performance fell within the wide range of reasonable professional assistance. *Id.* Additionally, claims of ineffective assistance of appellate counsel are evaluated under the same standard as those involving ineffective assistance of trial counsel. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). "Unless the underlying issue is meritorious, petitioner suffered no prejudice from counsel's failure to raise it on direct appeal." *Id.*

¶ 39 Here, attached to the defendant's postconviction petition are affidavits from the following former inmates at the Madison County jail: Ralph Hanner, Kevin Umfleet, William

Owen, and Jeremy Brown. Initially, we recognize that the affidavits of Ralph Hanner and William Owen do not comply with the affidavit requirements under the Act because they were not notarized or sworn before anyone who has authority under the law to administer oaths. See *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (an affidavit filed pursuant to the Act must be notarized to be valid). Therefore, these affidavits are not valid. The remaining affidavits, *i.e.*, affidavits of Umfleet and Brown, do not demonstrate that the defendant's trial counsel rendered ineffective assistance. Umfleet's affidavit dated April 1, 2007, indicates that Tomerlin had made the following statements: "he would do anything to get out of here as quick as possible"; he had heard things about the defendant's case from the other inmates; and he had talked with a detective and the prosecutor and they were going to "drop his charge down." In its order, the trial court determined that the record was clear that defense counsel had investigated the statements of inmates at the county jail and was aware of their proffered testimony, but had decided not to put them on the stand. The court then concluded that trial counsel's decision was a matter of trial strategy. Assuming counsel had known about the information contained in Umfleet's affidavit prior to trial, nothing in the affidavit indicates that Tomerlin's testimony was perjury or that Tomerlin did not have a direct conversation with the defendant concerning the defendant's case. Because the underlying issue is not meritorious, the defendant suffered no prejudice in appellate counsel's failure to raise it on direct appeal.

¶ 40 As for Brown's July 2007 affidavit, the defendant argued in his brief that he "learned of Jeremy Brown's knowledge about Tomerlin long after his direct appeal was heard and decided. Jeremy Brown's affidavit wasn't even filed with the original [postconviction] petition." Nothing in Brown's affidavit indicates that the defendant's trial counsel should have known about Brown's information prior to trial, especially when the defendant was not even aware of Brown's knowledge until "long after" the direct appeal was decided. Because

Brown's affidavit was not part of the trial record, appellate counsel could not be considered ineffective for failing to raise the issue on direct appeal.

¶ 41 For the foregoing reasons, we affirm the decision of the circuit court of Madison County dismissing the defendant's postconviction claims involving Tomerlin's testimony and denying the defendant's postconviction claims involving the stun-belt issue.

¶ 42 Affirmed.

¶ 43 JUSTICE WEXSTTEN, specially concurring:

¶ 44 I concur, but I share the defendant's concerns regarding the arbitrariness of the jail's written policy. I recognize that the policy was implemented prior to the promulgation of Supreme Court Rule 430 (eff. July 1, 2010) ("An accused shall not be placed in restraint of any form unless there is a manifest need for restraint to protect the security of the court, the proceedings, or to prevent escape."), but as the defendant states on appeal, "The restraints deployed here were administered in a way that effectively kept defense counsel and the trial judge ignorant of shackling's existence throughout trial." It has been held that "an electronic stun belt 'is no less a restraint than manacles or handcuffs' " (*People v. Allen*, 222 Ill. 2d 340, 346-47 (2006) (quoting *People v. Allen*, 354 Ill. App. 3d 442, 445 (2004))), and for over 35 years, the law in Illinois has been clear that a defendant may only be shackled "when there is reason to believe that he may try to escape or that he may pose a threat to the safety of people in the courtroom or if it is necessary to maintain order during the trial" (*People v. Boose*, 66 Ill. 2d 261, 266 (1977)). Considering that there was evidence that the use of a stun belt in the present case did not affect the jury, the defendant's presumption of innocence, the defendant's ability to assist in his defense, or the defendant's decision not to testify, however, I concur.